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Pages 1 - 57

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE

IN RE: FACEBOOK, INC. CONSUMER ) NO. 18-MD-02843 VC (JSC)  
PRIVACY USER PROFILE LITIGATION, )  
\_\_\_\_\_)

San Francisco, California  
Tuesday, January 11, 2022

**TRANSCRIPT OF PROCEEDINGS VIA ZOOM WEBINAR**

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Also Present: Honorable Gail A. Andler

Tuesday - January 11, 2022

10:01 a.m.

P R O C E E D I N G S

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**THE CLERK:** Court is now in session, the Honorable Jacqueline Scott Corley presiding.

Calling Civil action 18-md-02843, In Re Facebook. We don't need the appearances, but please state your name each and every time before you speak, for the reporter. Thank you.

**THE COURT:** Good morning.

And thank you, Judge Andler, for being here today. Mr. Garrie advised me he's unable to be here, but he can get a transcript.

Okay. So the main thing we need to discuss today is we have Facebook's three appeals of three of the Special Master's order. So now is the time for Facebook to be heard.

I will simply note that my review is *de novo*. So whoever is going to speak for Facebook, whichever appeal you would like to start with, please, go ahead.

**MR. SNYDER:** Thank you, Judge. Good morning. It's Orin Snyder. I'm going to have my colleagues Martie Kutscher Clark and Deb Stein address the three issues. They've been in the weeds and on the ground day-to-day.

I just wanted to say that these are three issues, Your Honor, before the Court, all of which we've worked through with you previously and we believed were settled. Two of the issues

1 we first began discussing, unfortunately, with the Court in  
2 early 2020.

3 And the bottom line is that, frustratingly, we appear to  
4 be back at square one or even square negative one despite Your  
5 Honor working hard and issuing what we thought was settled  
6 guidance long ago and despite the special master process.

7 And what we are going to respectfully request today is  
8 that Your Honor assist us in reimposing an orderly, fair, and  
9 proportionate discovery process because we're now three weeks  
10 away from the substantial completion deadline that  
11 Judge Chhabria ordered, and the goalposts still continue to  
12 move and threaten to upend that scheduling deadline in a way  
13 that is very concerning to us.

14 As Your Honor knows, we're eager to get to depositions,  
15 summary judgment, class cert, move the case forward. It's  
16 already too old, too delayed. And Your Honor knows how much  
17 we've produced, the millions and millions of pages.

18 Judge -- Special Master Garrie has ruled on a number of  
19 motions. He's rejected all of the allegations that Facebook  
20 has been hiding the ball after reviewing random samples of  
21 documents.

22 But the entire reason Your Honor and Judge Chhabria  
23 appointed the Special Master was to streamline, expedite, and  
24 avoid burdening this Court.

25 And, unfortunately, just to be clear or blunt about it,

1 the orders that we received, including one at 10:00 o'clock  
2 last night, that ordered us to produce every single ADI  
3 communication, period, full stop, really blows open issues that  
4 this Court spent a tremendous amount of time working through.  
5 And we just need finality repose. And the problem is, for  
6 example, an order we received last night.

7 **THE COURT:** I don't want to talk about that because  
8 there's a process for that. There's three that are pending  
9 before me.

10 **MR. SNYDER:** Okay.

11 **THE COURT:** So why don't we go forward with that.

12 **MR. SNYDER:** Sure.

13 **THE COURT:** So which one do you want to start with?

14 **MR. SNYDER:** So ADI, Your Honor.

15 **THE COURT:** Okay. And who's going to take that one?

16 **MR. SNYDER:** I'm going to have Ms. Clark do that.

17 **THE COURT:** All right. Ms. Kutscher Clark, please, go  
18 ahead.

19 **MS. KUTSCHER CLARK:** Your Honor, when we left off with  
20 you on ADI, you had done an in-camera review and disposed of  
21 plaintiffs' motion to compel ADI communications without  
22 ordering any of those communications produced.

23 You had also identified three specific buckets of  
24 documents that you found to potentially contain discoverable  
25 underlying facts uncovered by the investigation. Those were

1 background and technical reports prepared by non-attorneys,  
2 audits conducted by non-attorneys, and interviews conducted by  
3 non-attorneys.

4 You ordered Facebook to produce those documents for six  
5 specific apps, and we did that. And the only issue that your  
6 order left open for us to work through with the Special Master  
7 was whether materials in those same buckets were discoverable  
8 for other apps.

9 Unfortunately, now we're three weeks before the  
10 substantial completion deadline and the Special Master's order  
11 has brought back into play virtually all documents from ADI,  
12 which is very concerning to us for a number of reasons.

13 As you know, this case is not about ADI. ADI began after  
14 the lawsuit was filed. This lawsuit is, instead, about long  
15 defunct forums of data sharing that ended long before ADI even  
16 began.

17 Your prior orders and guidance recognized all of this and  
18 how that any ADI production should be proportionate and  
19 tailored to specific materials containing underlying facts that  
20 the investigation uncovered.

21 The Special Master's order --

22 **THE COURT:** What order said that? What order did I  
23 issue that said that?

24 **MS. KUTSCHER CLARK:** At multiple hearings, the  
25 Court --

1           **THE COURT:** But what order? There is no written order  
2 that says that; right?

3           **MS. KUTSCHER CLARK:** I believe both the order that the  
4 Court issued in September and there was also an order, that I'm  
5 digging for right now, from August that referred to underlying  
6 facts being discoverable while legal advice and legal work  
7 product not being discoverable.

8           **THE COURT:** Correct. Correct. That's right. I never  
9 ruled that attorney work product or attorney-client privilege  
10 communications had to be produced. I don't know what would be  
11 the basis for doing so.

12           I did rule, though, that despite Facebook's contention  
13 that the entire ADI was protected by the privilege or attorney  
14 work product, that it was not; right? That's what we had  
15 months of briefing on, and I did rule that.

16           **MS. KUTSCHER CLARK:** Correct. We understand that  
17 order. Obviously, we disagree with that order, but we do  
18 understand it. We have --

19           **THE COURT:** No, no, no. I mean, you didn't appeal it  
20 to Judge Chhabria. At the time Special Master Garrie hadn't  
21 been appointed.

22           **MS. KUTSCHER CLARK:** Right. And at that time the  
23 Court ordered Facebook to produce documents relating to six  
24 apps that were materials created by non-attorneys and three  
25 specific buckets and to work with the Special Master on



1 additional productions consistent with the Court's guidance.

2 Our concern at this point is the Special Master's order  
3 brings the parties all the way back to square one. It's  
4 bringing back into the case every single ADI document, the  
5 requests that we worked with the Court for two years to narrow.

6 I think the Court will remember that we did a very  
7 complicated, long, burdensome sampling process specifically so  
8 that the Court could provide guidance on what, if any, ADI  
9 communications were discoverable.

10 And plaintiffs were permitted to select communications  
11 that they wished for the Court to review in camera. We  
12 submitted those communications for the Court to review in  
13 camera. And after reviewing those documents, the Court did not  
14 order any of them produced.

15 Instead, at a hearing last April, you advised the parties  
16 that you found many of the communications, in your words, to be  
17 not at all relevant and that many of them were likely  
18 privileged.

19 Where we are now is the Special Master has held all of  
20 those communications are potentially back in play. And this is  
21 problematic not only for legal reasons, not only because it  
22 unwinds the work and this Court's guidance, but it also really  
23 throws a bomb in the discovery process right before the  
24 substantial completion deadline.

25 When we collected and reviewed the documents for six apps,

1 only six apps, it took 300 attorney hours to do that work.

2 ADI looked at millions of apps. If we were now ordered  
3 and an order was upheld that we had to collect and review, log,  
4 produce every single communication from ADI, that would take,  
5 charitably, at least a year, if not longer. It's a tremendous  
6 amount.

7 **THE COURT:** Isn't what the Special Master said is that  
8 he requires more information to determine relevance and whether  
9 such communication should be produced?

10 That's what he said in the order that you've appealed.

11 **MS. KUTSCHER CLARK:** Correct. And we provided the  
12 Special Master all of the communications from the six exemplar  
13 apps. And last night we received another order that said --

14 **THE COURT:** Not in front of me. Not in front of me.

15 So what I have in front of me is his order in response to  
16 your motion for reconsideration --

17 **MS. KUTSCHER CLARK:** Correct.

18 **THE COURT:** -- which apparently was well taken,  
19 because he did narrow his order considerably, and he said that  
20 he required more information to determine relevance and whether  
21 such communications should be produced.

22 But, as I understand, it's Facebook's position that no  
23 communications should be produced, that it's those six --  
24 nothing; right? Because you're appealing that order.

25 **MS. KUTSCHER CLARK:** Yes, Your Honor. And it's our

1 position that communications are categorically out of play at  
2 this point.

3 We did a very long exercise to work through this so that  
4 the Court could provide guidance on communications. The Court  
5 issued an order in September that stated it disposed of  
6 plaintiffs' motion to compel ADI communications, and it did not  
7 order any produced.

8 Again, the Court had also stated that many were not  
9 relevant and many were privileged. And we are now -- we're  
10 really back --

11 **THE COURT:** I don't know that I recall saying that  
12 they were privileged. I mean, basically, the 20 or so odd that  
13 the parties presented to me weren't at the heart of the matter  
14 at all. They were nothing. A lot of them were like between,  
15 you know, saying, oh, let's meet or do something and that there  
16 were other underlying data.

17 And what I had thought from reviewing it was, A, why is  
18 Facebook even fighting some of this? It's fighting over  
19 nothing. Perhaps there's a way for the parties to agree that  
20 the underlying data could be produced.

21 **MS. KUTSCHER CLARK:** Right.

22 **THE COURT:** And not attorney -- and the parties met  
23 and conferred and were unable to come to agreement. So then I  
24 had to issue the opinion as to whether the ADI was attorney  
25 work product and, therefore, privileged.

1 And I held it was not because Facebook told the entire  
2 world, told all their members, that they were conducting this  
3 investigation to root out any problem apps and make sure it was  
4 safe for their customers. That's what they told them.

5 And, as I recall, I said in my order to find in favor of  
6 Facebook I would have to find that Facebook was lying when they  
7 said that to their users. I don't find that they were lying,  
8 and you didn't argue that you were lying.

9 So that's my understanding of how it went, which is why I  
10 asked if you could point me to a written order in which I said  
11 that communications are forever out of play, that you can't  
12 have them, that the discovery is limited forever to those six  
13 apps.

14 It's not an iterative process at all as to those six apps.  
15 I don't recall that being in a written order.

16 **MS. KUTSCHER CLARK:** Your Honor, there's a general  
17 presumption that when a party makes a request for specific  
18 materials and the Court resolves the request without ordering  
19 those materials produced, the request has been denied.

20 **THE COURT:** Okay. I just want to say you should not  
21 litigate based on that presumption. That is not how it works.  
22 I wouldn't do that. That's a mistake.

23 **MS. KUTSCHER CLARK:** We understand.

24 And, again, Your Honor, one of our biggest concerns is  
25 that when we were before the Court last April, after we had

1 done this full sampling exercise, after the Court had looked at  
2 the materials in camera, recognizing the volume, recognizing  
3 how messy all this was, recognizing that many of these  
4 materials were not relevant, the Court asked plaintiffs, What  
5 is it that you really need? I don't think you need all of  
6 these communications.

7 And plaintiffs agreed with that, and they said, We don't;  
8 what we need are the underlying facts. And that led to, I  
9 think, six months of back and forth about underlying facts.

10 And the parties worked in mediation, the parties worked  
11 with the Special Master, the parties submitted extensive  
12 supplemental briefing to the Court in order to get plaintiffs  
13 what we were all describing as underlying facts. And those  
14 were the materials the Court ultimately ordered produced.

15 The Court ordered these background and technical reports  
16 that involved investigations of the apps and factual  
17 information about the apps. The Court ordered interviews,  
18 audits, the types of materials that would have factual  
19 information in them. And that was all consistent with the  
20 conversation we had to focus plaintiffs' request on facts  
21 instead of communications about how this investigation was  
22 conducted years after this case was even filed.

23 And our -- our biggest concern right now is we've unwound  
24 all that. The Special Master has erased all of that work.

25 **THE COURT:** See, I don't understand --

1           **MS. KUTSCHER CLARK:** We are talking about the  
2     communications.

3           **THE COURT:** Ms. Kutscher Clark, I don't understand  
4     because the order you appealed, the Special Master, in response  
5     to your motion for reconsideration, specifically stated he  
6     requires more information to determine relevance and whether  
7     such communication should be produced.

8           So, as I understand it then, Facebook's position is that  
9     no communication should be produced because you specifically  
10    called out and put in your notice of appeal that you were  
11    appealing that determination. Correct?

12          **MS. KUTSCHER CLARK:** Correct.

13          **THE COURT:** Okay.

14          **MS. KUTSCHER CLARK:** Okay.

15          **THE COURT:** So your position is that no communication  
16    should be produced.

17          **MS. KUTSCHER CLARK:** That is correct.

18          **THE COURT:** Okay. All right.

19          So I guess I don't understand why you're saying the  
20    Special Master has unwound everything. What he did is he said,  
21    no, I'm going to figure out if some of those communications  
22    should be produced.

23          **MS. KUTSCHER CLARK:** What we're saying is the Special  
24    Master is redoing a process that was already completed before  
25    this Court.

1           **THE COURT:** Okay.

2           **MS. KUTSCHER CLARK:** Many months went into doing a  
3 sampling exercise, litigating, providing the Court in-camera  
4 communications to determine whether or not communications  
5 should be produced, and none were ordered produced.

6           And then nearly a year after that we received an order  
7 basically starting that process again saying, Facebook, give me  
8 documents to review in camera so we can look at whether  
9 communications should be produced.

10           All of this work had already been done, which is, again,  
11 as Mr. Snyder was saying, a very concerning aspect of this  
12 because we're litigating issues over and over again, and this  
13 was one that we thought had already been settled.

14           **THE COURT:** Okay. All right. Do the plaintiffs wish  
15 to say anything?

16           **MR. LOESER:** Yes, thank you, Your Honor. Good  
17 morning.

18           I think the place to start is to go back and look at what  
19 was ordered by Special Master Garrie. Ms. Kutscher Clark has  
20 focused exclusively on the communication aspects of it. And I  
21 do want to talk about it, but it's also important to keep in  
22 mind that there are all of the other reports.

23           So after Your Honor entered its order, you required  
24 certain materials for the six exemplar apps. And then Your  
25 Honor indicated that other materials would be produced, we

1 should work with the Special Master about producing other  
2 materials consistent with that guidance.

3 We now know there are approximately [REDACTED] other reports  
4 that are also by third-party companies hired by Facebook, [REDACTED]  
5 and [REDACTED]. And notwithstanding the instruction to --  
6 to produce other materials --

7 **MS. KUTSCHER CLARK:** Your Honor, respectfully, I need  
8 to interrupt Mr. Loeser because he is revealing publicly, in  
9 court, information that the Court has consistently sealed about  
10 the outside experts that Facebook retained. And I would  
11 request, if Mr. Loeser wishes to reveal that type of  
12 confidential information, that we go into closed court.

13 **THE COURT:** It's unnecessary to reveal it. You don't  
14 need to mention any names, Mr. Loeser.

15 **MR. LOESER:** Sure.

16 **MS. KUTSCHER CLARK:** Thank you.

17 **MR. LOESER:** My apologies.

18 The point is that there are a whole lot of other reports  
19 just like the ones that they produced. And notwithstanding  
20 your guidance to work with the Special Master to produce other  
21 materials consistent with your guidance, in the many, many  
22 months since the September 8th order Facebook has produced not  
23 one other report.

24 So when considering what Special Master Garrie ordered,  
25 the first thing to consider is that there's this population of



1 materials, these other reports for which Facebook has not one  
2 argument, and you haven't heard one today, as to why those  
3 materials have not been produced and why they should not be  
4 produced.

5 As to the issue of communications, Facebook's argument  
6 basically is Your Honor settled this when it didn't order those  
7 communications after the logging exercise the parties went  
8 through.

9 But, as Your Honor noted, that logging exercise wasn't  
10 particularly helpful because the materials were not  
11 particularly relevant. Those materials were blindly selected  
12 by plaintiffs from a log of 6,000 documents. Your Honor then  
13 issued an order that provided guidance.

14 So the question for the Court is, is the requirement to  
15 produce and then, in the amended order, for Special Master  
16 Garrie to receive in camera to evaluate these other  
17 communications, are those other communications consistent with  
18 your guidance? And the answer is yes, they are.

19 They are entirely consistent because those other  
20 communications can't be work product because, as Your Honor  
21 explained in great detail, there's a dual purpose here, and  
22 these communications about the ADI the same dual purpose as the  
23 other materials Your Honor ordered produced.

24 And these materials can't be protected by the  
25 attorney-client privilege because, just like the materials Your

1 Honor ordered produced, these are not communications by, to, or  
2 from lawyers. These are internal communications at Facebook  
3 regarding the ADI. So that is very much consistent with your  
4 guidance.

5 And just to pause for a minute as to why we are so  
6 concerned about these communications and why they are so  
7 important to produce, as we all know, in modern litigation the  
8 internal email is the unvarnished truth. Companies talk  
9 directly about -- and contemporaneously about the events at  
10 issues in litigation.

11 The ADI is very much at the heart of this litigation.  
12 They were going back and looking at other apps that misused and  
13 abused user data just like Cambridge Analytica. And what  
14 internal people, who are not lawyers and are not seeking legal  
15 advice, say to each other about the ADI, the results, the  
16 findings is critical information in this case.

17 If one engineer says to another, Did you see the latest  
18 [REDACTED] memo? I can't believe that we didn't shut those people  
19 down. We've known for years that they were abusing user  
20 information --

21 **THE COURT:** Mr. Loeser, I just want to stop you for a  
22 moment. I think I said not to mention names.

23 **MR. LOESER:** I'm sorry.

24 **THE COURT:** Ms. Clark brought it up, and to do it  
25 again --

1           **MR. LOESER:** I'm sorry.

2           **THE COURT:** -- gives great pause. You're a good  
3 lawyer, and I don't know how you could unintentionally make  
4 that mistake.

5           **MR. LOESER:** Well, I --

6           **THE COURT:** I think I've heard enough from the  
7 plaintiff now.

8           Ms. Clark, did you wish to respond further?

9           **MS. KUTSCHER CLARK:** I wanted to make clear that the  
10 Court never categorically held that there are no privileged  
11 documents and that there's no work product among the ADI  
12 materials.

13           The Court held that the work product protection did not  
14 attach to specific types of materials created by nonlawyers,  
15 and the Court's September order states explicitly that it's not  
16 addressing attorney-client privilege and that plaintiffs were  
17 not even seeking materials created by lawyers or communications  
18 with lawyers.

19           The Special Master's order goes far beyond that and  
20 actually does address --

21           **THE COURT:** It does not. It does not. His order was  
22 limited to non-attorney. That's what I didn't get. His was  
23 non-attorney. He has not ordered production of attorney  
24 communications.

25           **MS. KUTSCHER CLARK:** What he asked us to provide him

1 in camera were all communications relating to the six apps,  
2 including --

3 **THE COURT:** Well, in camera, in camera, because he has  
4 to address privilege; right? Because the question is, there  
5 are some communications that may in fact -- there are some  
6 things part of the ADI that may, in fact, be privileged.

7 There may be edits from lawyers to, you know, reports or  
8 things like that. There may actually be communications seeking  
9 legal advice. You're correct, I did not hold that those  
10 communications, that work product would not be privileged or is  
11 privileged. I didn't have any of those things in front of me.  
12 What I had was Facebook's, you know, swinging-for-the-fences  
13 argument that every single thing part of the ADI was  
14 privileged, and that argument I rejected.

15 **MS. KUTSCHER CLARK:** Your Honor, I think what would be  
16 most helpful at this point would be guidance from the Court  
17 that any further ADI productions need to be proportionate and  
18 tailored at this point.

19 As Mr. Loeser said, Facebook will be producing all of  
20 these background and technical reports that have a tremendous  
21 amount of underlying factual information.

22 Those are the reports the Court was very focused on and  
23 that we submitted declarations about several months ago.  
24 You've ordered production of interviews, audits. Those are all  
25 of the underlying factual information.

1           **THE COURT:** Can I stop you for one second? My  
2 understanding is, with the six exemplar apps, you've taken the  
3 position that none of those things exist, that there aren't  
4 any -- anything other than the reports by the consultants.  
5 There aren't any interviews.

6           **MS. KUTSCHER CLARK:** Interviews and audits were --

7           **THE COURT:** There aren't any audits.

8           **MS. KUTSCHER CLARK:** For the six exemplar apps, that's  
9 correct.

10          **THE COURT:** So Facebook's position is they don't have  
11 to produce any interviews or audits because your position is  
12 that it's limited to those six exemplar apps.

13          **MS. KUTSCHER CLARK:** No, that's not correct. The  
14 Special Master, in his order, orders production of those  
15 materials for other apps as well.

16          **THE COURT:** And you're not objecting to that.

17          **MS. KUTSCHER CLARK:** We have not appealed that.

18          **THE COURT:** Okay. All right. But why doesn't the  
19 Special Master's order that says he requires more information  
20 to determine relevance whether such communications be  
21 produced -- that's the guardrails that you just asked for.

22          **MS. KUTSCHER CLARK:** Your Honor, we're in a little bit  
23 of a tricky position because the Special Master has now  
24 supplemented his order to be very different. And I know that  
25 that order is not before the Court, so we're in a -- you know,

1 it's a little tricky today because he has now ordered every  
2 single document to be produced. But, from our perspective,  
3 this further review never should have happened. We did all  
4 this work with the Court previously. There was no reason to  
5 unwind all of that.

6 And, again, we had understood the focus on underlying  
7 facts, the focus on the specific types of documents prepared by  
8 non-attorneys, that involved factual information, to be what  
9 plaintiffs were requesting and what the Court had asked -- the  
10 Court -- the Court had asked plaintiffs to focus on. And if  
11 we -- you know, at this point, if we were to dive back into  
12 communications, we see no way that it would not significantly  
13 delay the case.

14 And, again, I'm just going to briefly mention that the  
15 Special Master has now ordered Facebook to produce every single  
16 document from ADI, including attorney communications, which we  
17 will separately appeal. But if we were required to do that, I  
18 don't see how it would not delay the case for at least another  
19 year while we collect, review, and analyze millions of  
20 additional documents.

21 **THE COURT:** Okay.

22 **MR. LOESER:** Your Honor, if I may, very briefly?

23 **THE COURT:** No, Mr. Loeser. I'm sorry. You struck  
24 out for today. Someone else is going to have to argue. I'm  
25 sorry. I'm sorry.

1           **MR. LOESER:** Your Honor --

2           **THE COURT:** She brought it up and I brought it up, and  
3 that's it. That's it. Not today. Someone else is going to  
4 have to argue.

5           I don't need to hear from the plaintiffs anymore on that  
6 one. I want to move to the appeal regarding the plaintiffs --  
7 named plaintiffs' data.

8           So, Ms. Stein.

9           **MS. STEIN:** Thank you, Your Honor. Appreciate that.

10          So the named plaintiff data appeal largely centers around  
11 our asking Your Honor to hold plaintiffs to their word and  
12 confirm that the only user data that's relevant to this  
13 data-sharing case is that data that Facebook -- data that was  
14 shared or made accessible to third parties.

15          When we were before Your Honor, before we had the Special  
16 Master engaged, and we were litigating this before Your Honor,  
17 this was a very significant moment in time when plaintiffs said  
18 in their last brief, in response to Facebook's concern about  
19 the scope of all this user data being sought, that plaintiffs  
20 seek only upholding that sensitive data Facebook collected  
21 about ten named plaintiffs and shared with third parties is  
22 relevant.

23          Plaintiffs do not contend that information that was not  
24 shared is relevant, which substantially narrows the information  
25 Facebook would be required to produce in this case.

1 And, as Your Honor may recall and as we noted in our  
2 briefing and in our motion for reconsideration before Special  
3 Master Garrie, this concession about information not being  
4 shared, which Mr. Loeser expanded to "shared" or "accessible,"  
5 and which we would like to honor that, is a very, very  
6 significant concession here in terms of the fact that this case  
7 is about data sharing, which I think there's no dispute about  
8 that, but about what -- what user data could possibly be  
9 relevant here.

10 And this impacts not only the issue before Special Master  
11 Garrie but, obviously, the scope of the case and what else  
12 might become relevant as we go through depositions. Because if  
13 this case is expanded to be something other than data sharing,  
14 that's going to be a very significant sort of what I know  
15 Mr. Snyder always refers to as a "Whack-a-Mole" problem in this  
16 case.

17 Plaintiffs cabined their own description of what's  
18 relevant in this case to data that's shared or made accessible.  
19 The special Master's holding does not hold plaintiff to their  
20 word and does not cabin this data-sharing case to data that was  
21 actually shared or made accessible.

22 Facebook has produced approximately 1 million pages of  
23 data relating to the named plaintiffs. We have multiple  
24 declarations in the record about what this data includes. This  
25 data was from a tool that was specifically designed to allow



1 users to access the most complete set of data that Facebook  
2 maintains about them.

3 **THE COURT:** We already litigated that, and I held that  
4 you weren't limited to that.

5 Isn't it Facebook's position that data that was inferred  
6 from off-platform activity is not shared?

7 **MS. STEIN:** So, Your Honor, the inferred data is not  
8 shared with advertisers. They're in the DYI file that was  
9 produced. There is inferred data that is included in that.

10 **THE COURT:** From off-platform activity?

11 **MS. STEIN:** Yes, Your Honor.

12 **THE COURT:** Because when I went back and I re-read the  
13 briefs, Facebook repeatedly said in its briefs that none of  
14 that data was shared with third parties --

15 **MS. STEIN:** That's correct.

16 **THE COURT:** -- and, therefore, should not be produced.

17 **MS. STEIN:** So, Your Honor, that is a true statement.  
18 Facebook does not share inferred data. Nonetheless, there was  
19 inferred data that was produced because it's part of the DYI  
20 file.

21 **THE COURT:** So why, then, did we litigate and have all  
22 this argument as to whether data inferred from off-platform  
23 activity had to be produced or was within the scope of the case  
24 if you knew and it was your position that it wasn't shared and  
25 it was Facebook's position that data not shared didn't have to

1 be produced? Which now explains why, then, you didn't produce  
2 any after I issued the order.

3 It seemed it was a pointless exercise if it was Facebook's  
4 understanding all along that whatever we say was not shared we  
5 don't have to produce.

6 **MS. STEIN:** So, Your Honor, I have two responses to  
7 that. First of all, when we were litigating this issue, we  
8 litigated it before Your Honor and did not have plaintiffs'  
9 position with respect to shared or made accessible data until  
10 their last brief on this point.

11 So when we were litigating it, we did not know that they  
12 were limiting their position to that, so we were having to  
13 argue, you know, both the fact that it was not shared and also  
14 the fact that that did not fall within the scope of the case.

15 I would like to respectfully remind Your Honor, when --  
16 you never ordered that Facebook had to produce more than DYI.  
17 Your Honor ordered a 30(b)(6) deposition to see if there was  
18 material beyond what's in the DYI materials that was shared or  
19 made accessible.

20 That was a very significant moment in the proceedings when  
21 we reminded -- when we flagged for Your Honor that, based upon  
22 plaintiffs' concession that the case was limited to data and  
23 that they were only entitled to data that was shared or made  
24 accessible, we raised the point that we thought we were  
25 complete based upon that concession.

1 And plaintiffs said, We don't want to take Facebook's word  
2 for it, and Your Honor said, You can have a 30(b)(6)  
3 deposition. And plaintiffs took a 30(b)(6) deposition to what  
4 Your Honor said should explore whether there are materials  
5 beyond the DYI file that would fall into the bucket of data  
6 that was shared or made accessible.

7 Plaintiffs took that deposition. I defended that  
8 deposition, Your Honor. And after that deposition, if  
9 plaintiffs had something, they should have put that in their  
10 motion to compel to Special Master Garrie and say, We learned  
11 in this 30(b)(6) deposition that the DYI file is not the only  
12 material that should be produced in this case; there's another  
13 database that third parties can access and Facebook failed to  
14 produce from that database.

15 Well, Your Honor, despite taking that 30(b)(6) deposition  
16 and being able to ask whatever they wanted, essentially, about  
17 what data was shared or made accessible, plaintiffs didn't come  
18 forward with an iota of evidence that there was another  
19 database that was accessible by third parties that contained  
20 plaintiffs' user data.

21 And this is very significant, Your Honor, because breaking  
22 open this issue beyond data that was shared or made accessible  
23 means that there's no limit to what plaintiffs could be asking  
24 about in this case, in terms of the scope of the case, where  
25 data resides, even data that, you know, is anonymized,

1 aggregated.

2 There's a tremendous burden that we put in declarations  
3 into the record that shows that in order to scour the Facebook  
4 systems would literally take thousands of years in order --

5 **THE COURT:** You know, I didn't understand that  
6 argument because, again, in response to your motion for  
7 reconsideration, the Special Master listened and heard you, and  
8 he changed his order to require what he called high-level  
9 information about the data sources which Facebook -- I think  
10 maybe it was Mr. Ross -- identified. High-level information.  
11 And yet your appeal said that he ordered detailed information.

12 Normally, I haven't seen high-level information to  
13 coincide with detailed. I mean, they came up with that list  
14 somehow. The high-level information he sought, seemed like  
15 they had to have that information, Mr. Ross, to even come up  
16 with that list.

17 **MS. STEIN:** So the list that was provided -- I believe  
18 you may be referring to Mr. Pope.

19 **THE COURT:** Pope. Ross, Pope. Four letters.

20 **MS. STEIN:** The list that was provided was the result  
21 of, I believe, a year's worth of work, inventorying and  
22 figuring out across multiple groups and many, many, many  
23 employees to try and put that high-level list together.

24 But it's a slippery slope, Your Honor, because now -- now  
25 Special Master Garrie wants to have hours of evidentiary

1 hearings about those data sources.

2 **THE COURT:** It's the slippery slope that can be  
3 stopped with a sticky staircase. I just heard that one the  
4 other day.

5 **MS. STEIN:** I like that expression, but, respectfully,  
6 this is why there is a 30(b)(6) witness.

7 The issue that we are asking Your Honor to honor is that  
8 this case and the relevant data in this case is about data  
9 that's shared or made accessible. And Special Master Garrie  
10 said that -- refused to honor that. And he has broken the  
11 gates wide open.

12 And, you know, maybe it's the case Your Honor feels like  
13 you're okay with Special Master Garrie doing a little bit more  
14 exploring as to whether there was other data that was shared or  
15 made accessible. We would disagree with that. We believe that  
16 ship has sailed, and we don't believe there's anything else to  
17 produce. But to not at least cabin that exploration to be  
18 limited and to tell Special Master Garrie that the rule in this  
19 case is that the only producible data here is data that was  
20 shared or made accessible, it's very significant.

21 And Special Master Garrie needs to hear that from you  
22 because he's, you know, trying to, you know -- you know, read  
23 all the history in this case, which I'm sure is quite  
24 challenging. And he, I'm sure, wants to honor and respect what  
25 you have said in this case. And he, respectfully, needs to

1 have direction that the only relevant data in this case, as far  
2 as plaintiffs' data goes, is data that was shared or made  
3 accessible. And that is what plaintiffs have said.

4 **THE COURT:** Well, yes. But Facebook's position is the  
5 only named plaintiff -- we're only talking about the named nine  
6 now, nine named plaintiffs, which is fair -- that the only data  
7 that is discoverable is that which Facebook contends was shared  
8 or made accessible, and if Facebook says it was not shared or  
9 made accessible, that's the end of the matter.

10 **MS. STEIN:** I would actually -- I would -- I'd like to  
11 clarify that, Your Honor, because when we talk about shared or  
12 made accessible, we're talking about that from a technological  
13 standpoint. So it's not a substantive -- you know, this was --  
14 it's our position that this was shared or made accessible.  
15 This is about how the technology works.

16 And we have a technological -- you know, a technology  
17 declaration in the record that explains that the theories that  
18 are in play in this case, the technology that gets hooked up,  
19 you know, to these databases, there aren't other databases that  
20 are accessible to third parties.

21 And plaintiffs were given a 30(b)(6) deposition so that  
22 they didn't have to take our word for it. Your Honor said they  
23 could take a 30(b)(6) deposition so that they could find out  
24 whether there were other data sources that were hooked up, you  
25 know, to the outside world that would allow them to have

1 access, and they took that deposition.

2 You know, respectfully, I don't think they asked the right  
3 questions. They asked very few questions about shared -- I  
4 don't even think they used the words "shared" or "made  
5 accessible" in the deposition. That was their opportunity.

6 They took that deposition, I think, a year ago, Your  
7 Honor. And to blow this open now and to give plaintiffs  
8 exploratory discovery on the eve of the substantial completion  
9 deadline not only about -- you know, about what was shared or  
10 made accessible, but beyond that, to basically say anything is  
11 fair game because, according to Special Master Garrie's order,  
12 this case is not so limited.

13 **THE COURT:** Well, that's not -- I don't think that's  
14 the case. The plaintiffs agreed that the case is about data  
15 that was shared. There's no question about that.

16 The question is, in discovery, how you get to that answer.  
17 That's -- that's the question is, how do you get to that answer  
18 as to what was shared and what was made accessible.

19 I wonder, a little bit, why Facebook doesn't want to just  
20 tell the named plaintiffs what data it collects about them,  
21 whether it's shared or not.

22 **MS. STEIN:** Well, we have produced that to them, Your  
23 Honor. We have produced the best representation we have in  
24 human readable form.

25 The DYI file, it's hundreds of thousands of pages for some

1 of the named plaintiffs. It goes well beyond what the  
2 plaintiffs just post themselves. It has a very -- you know, we  
3 can point Your Honor to a very robust description of the DYI  
4 file. That tool is basically designed so that there's  
5 transparency for any user to be able to go and download, using  
6 the Facebook tool, to say what has Facebook collected about me?  
7 What do they --

8 **THE COURT:** Well, then there's no dispute. If you've  
9 already produced everything, what are we arguing about?

10 **MS. STEIN:** Because Special Master Garrie is not  
11 holding plaintiffs to this --

12 **THE COURT:** No, you said that you -- that plaintiffs  
13 already have everything that Facebook collects about them  
14 regardless of whether Facebook contends it is shared or not.  
15 Then there's nothing to fight about.

16 **MS. STEIN:** So, your Honor --

17 **THE COURT:** It must be that Facebook collects  
18 additional information which it does not now want to produce to  
19 the named plaintiffs.

20 **MS. STEIN:** So I think I'd like to clarify what Your  
21 Honor just said. We have produced everything that is in the  
22 social graph, that we have in human readable form, that is  
23 potentially accessible by third parties depending on what the  
24 permission settings are.

25 **THE COURT:** The additional information -- I mean,



1 Mr. Pope, those 150 databases, right, he identified them as  
2 potentially having information about the named plaintiffs.

3 **MS. STEIN:** Well --

4 **THE COURT:** And that information has not been  
5 disclosed.

6 **MS. STEIN:** So there are many different databases.  
7 One of the most significant ones is a storage database where  
8 information is anonymized, aggregated information, not  
9 accessible. It's information that would be likely duplicative.  
10 It's backed up, basically. It's a storage facility and where  
11 analytics might be run -- there are declarations about this in  
12 the record -- but it's not accessible.

13 But that information -- you know, if it's based upon  
14 something that the users posted or shared or activity on  
15 their -- using their Facebook account, that's something that  
16 would have been produced through the DYI tool.

17 **THE COURT:** Okay. But does it include something that  
18 would not have been reproduced through that tool?

19 **MS. KUTSCHER CLARK:** Can I add some detail?

20 **MS. STEIN:** Sure. Of course. Thank you, Martie.

21 **MS. KUTSCHER CLARK:** I think what's helpful to  
22 understand here is the issue is not that Facebook is trying to  
23 hide any data. Facebook makes very clear in its data  
24 disclosures, its data policies, exactly what information it  
25 collects about users.

1       The difficulty here is that it's stored in very  
2 complicated ways. Facebook is an enormous company with a very,  
3 very complicated data infrastructure. And, as we've discussed  
4 a lot of times, it has data storage facilities that have  
5 millions and millions of data tables, that have trillions of  
6 data points within them. Much of this data is anonymized.  
7 Much of it's aggregated with data about millions of other  
8 users.

9       In order to go through all those data sources and try to  
10 identify any data point that might relate back to a particular  
11 user is a gargantuan undertaking. It's not that we're trying  
12 to hide data, it's that it's extraordinarily difficult to find  
13 all of it and to figure out which data might relate back in  
14 some way to one of these people. And the issue is --

15       **THE COURT:** But, Ms. Clark, isn't that what  
16 Mr. Garrie -- why he asked for -- isn't what you just gave what  
17 he asked for? A high-level description of the most common  
18 functions and purposes of the system.

19       So for any particular system, you would say it's just  
20 storage of this and it's used by this. And he'll say, okay,  
21 then I guess there isn't anything to do there.

22       I mean, I don't understand. What's the objection to the  
23 high-level description of the most common functions and  
24 purposes of the system?

25       **MS. KUTSCHER CLARK:** I want to make clear that we've

1 already complied with Mr. Garrie's order. And we have  
2 submitted information earlier this week about all of those data  
3 sources. So I want to make sure the Court is aware of that.

4 **THE COURT:** So is it moot then, your appeal of that  
5 portion of the order?

6 **MS. KUTSCHER CLARK:** Uhm, potentially, yes. But what  
7 we're appealing is the holding that data that is not shared is  
8 relevant and discoverable in the case, because Mr. Garrie did  
9 not say, I'd like to further explore whether other data was  
10 shared. What he said is the discoverable data is not limited  
11 to data that was shared or made accessible, which --

12 **THE COURT:** As I read the briefs, though, the briefs  
13 that were presented to Mr. Garrie, what plaintiffs' argument  
14 was, was we don't disagree that the data shared, but as this  
15 Court, as I ruled, that's sort of an open question as to what  
16 was shared or made accessible.

17 So it really comes back, I think, to Ms. Stein's point  
18 that the 30(b)(6) was the beginning and the end --

19 **MS. KUTSCHER CLARK:** Correct.

20 **THE COURT:** -- and plaintiffs get no more.

21 So let me hear from plaintiffs on that with respect to the  
22 30(b)(6).

23 **MS. WEAVER:** Thank you, Your Honor. Good morning and  
24 Happy New Year.

25 So I think that Your Honor has made many of the points

1 that we've made. I think the record needs to be corrected on a  
2 few salient points.

3 The first is that the 30(b)(6) deponent on data, which I  
4 took, was unable to answer questions about how Facebook shared  
5 data. In fact, there were two individuals who verified  
6 interrogatories on the question of capabilities in APIs.

7 And when I asked the witness about how data was shared,  
8 Ms. Stein said to me in the transcript: "He did not sign the  
9 interrogatories on those points."

10 We can seek another 30(b)(6), but in the interim Your  
11 Honor appointed Special Master Garrie, who, as we all  
12 acknowledge, is very sophisticated --

13 **THE COURT:** Oh, I just want to correct something for  
14 the record.

15 **MS. WEAVER:** Yes.

16 **THE COURT:** I have no power to appoint a Special  
17 Master. It was Judge Chhabria.

18 **MS. WEAVER:** Fair enough. Judge Chhabria appointed  
19 Special Master Garrie, and I think all parties agreed that he  
20 was highly qualified to investigate these issues.

21 The order that is being challenged right now is very  
22 basic. It's Discovery 101. Tell us all data sources that  
23 might have data relating to these eight people. And we're in  
24 the very nascent stages of that.

25 And, as you said, it's unclear to plaintiffs whether

1 that's mooted or not. So it seems like what we're focused on  
2 right here is the question of what is shared or made  
3 accessible. And plaintiffs contend that that is a question for  
4 the jury. And to get to the jury, we need discovery.

5 And let me point out a few --

6 **THE COURT:** Well, I'm going to stop you one second.

7 **MS. WEAVER:** Yes.

8 **THE COURT:** Not if it's undisputed.

9 **MS. WEAVER:** Yes.

10 **THE COURT:** Not if you don't have a good-faith  
11 argument based on evidence that something is not -- you know,  
12 is not shared. It is not -- we're not there yet. It may or  
13 may not be; right?

14 **MS. WEAVER:** Excellent. Good point. I agree.

15 Let me point out some comments that Ms. Stein made that  
16 underlines why we, plaintiffs, feel like Facebook should not be  
17 the arbiter of what is discoverable based on their definition  
18 of what is shared.

19 She said today, "in the social graph," "data in the social  
20 graph," "data in human readable form," "data is not accessible,  
21 "data is likely duplicative." All of those are conclusions and  
22 assertions made by counsel. They are not rooted in evidence.

23 And Special Master Garrie is uniquely qualified to make  
24 those decisions as between -- and also to consider proportion.  
25 He hasn't ordered Facebook to produce all the data in the hive

1 relating to these nine people. He's just said, Tell me what's  
2 there and describe it so we can get our arms around it.

3 Another point to make is that data reciprocity is also in  
4 this case. Facebook possesses data that it received from data  
5 brokers about our nine named plaintiffs. Under this narrow  
6 ruling right now, they're saying, oh, you don't get to know  
7 that.

8 And you have to look at this in the context that Facebook,  
9 in almost every hearing, has come in and said these plaintiffs  
10 have no standing, they weren't hurt, they don't know what's  
11 going on.

12 They've now deposed two of our plaintiffs, both of whom  
13 very clearly asserted standing. Plaintiff Tyler King said,  
14 hey, I had Netflix and I had Spotify. And we know that Netflix  
15 and Spotify were reading users' private Facebook Messenger  
16 messages. And we only know that because it's public not  
17 because of what Facebook has produced here.

18 So we would think that would be enough. But if Facebook  
19 is going to say, no, we need to see -- you have to prove that  
20 Ms. Tyler King's messages actually went to Netflix and Spotify,  
21 we are entitled to that discovery. They can't make an argument  
22 and then deny us the discovery of what happened here.

23 One final, you know, bigger-picture point is that if what  
24 Facebook is saying here is that it would take them a year to  
25 identify data sources for nine people, that isn't merits. The

1 jury deserves to hear that.

2 We want a response admitting that, as well, and an order  
3 so that we can tell the jury they took so much data from these  
4 nine people they can't even identify it. They don't know where  
5 it is, they don't know how it was used. All of this is fair  
6 game for discovery in our view.

7 We're not saying today, and there is no order today  
8 saying, Facebook, produce all the data in these 149 sources.  
9 It's merely, disclose what you have on these nine people.

10 And I'll pull back to the Discovery 101. Plaintiffs are a  
11 little bit befuddled because this is a 26(f) disclosure  
12 conversation that should have happened in 2019. Anytime we're  
13 in a case, we're like, okay, identify the data sources.

14 We understand that Facebook is complex. We have a lot of  
15 experts who understand precisely what Ms. Stein is talking  
16 about when she talks about anonymization. We know how to  
17 preserve. We can get into that with Special Master Garrie.  
18 He's uniquely situated here.

19 But there is neither a procedural problem with his ruling  
20 and certainly not a substantive one. And I think it would be  
21 erroneous for the Court today to make a ruling on the  
22 definition of what is shared or made accessible in a vacuum.

23 Yes, on December 10th, Facebook put in a number of  
24 declarations for the first time, that plaintiffs had never  
25 seen, making factual assertions about data types and sources

1 that Facebook had never before identified or produced.

2 We're ill-equipped to respond to that right now. I mean,  
3 at worst, at least, Facebook should be able to explore and  
4 depose Mr. Pope and talk about all of these data sources and  
5 figure out the basis.

6 We know that there's a hearing in front of Special Master  
7 Garrie this Friday, at noon, on this topic, but for plaintiffs'  
8 perspective, we're finally at the beginning. We're finally  
9 going to have identify these data sources. We would like to  
10 get in there and not be foreclosed, as I was in the 30(b)(6)  
11 deposition, to talk about the data sources.

12 We only had, frankly, Your Honor, one document at that  
13 time, at that deposition, that talked about dependent and  
14 behavioral data. If you look at Exhibit 18 to our filing,  
15 there were other exhibits we have. That one's between board  
16 members talking about the kinds of data that's collected.

17 What is very clear is that Facebook develops -- this has  
18 been our allegation from the beginning. They create profiles.  
19 Our plaintiffs all testified, I would really like to know what  
20 inferences Facebook is drawing about me and then how it is  
21 selling that information to advertisers and other -- other  
22 entities.

23 I mean, it depends how you defined advertiser. It's not  
24 necessarily somebody who's selling a product. It's somebody  
25 who's trying to instigate behavior, whether it's a political



1 party. That's what we want. We want the profiles that  
2 Facebook has on the individuals.

3 And they will say they're not really profiles, what they  
4 are is aggregated datasets. And that's what we want  
5 identified, and Special Master Garrie can help get us there.

6 **THE COURT:** All right. Anything further, Ms. Stein?

7 **MS. KUTSCHER CLARK:** Your Honor --

8 **MS. STEIN:** Ms. Clark is actually going to address the  
9 proportionality issue in particular.

10 **MS. KUTSCHER CLARK:** Yes. Your Honor, just like the  
11 ADI issue, this brings us back to a relevance burden,  
12 proportionality, the fact that we have a discovery cutoff in  
13 three weeks.

14 We have long --

15 **THE COURT:** I'm just going to cut you off, Ms. Clark,  
16 because, in response to your motion for reconsideration,  
17 Special Master Garrie changed his order to say just give us  
18 this high-level detail, this very basic information, just so he  
19 can address those very concerns.

20 Of course those are issues. Those are live issues. And  
21 that's why he asked for that high-level information. So he  
22 hasn't ordered you to do -- to produce anything --

23 **MR. SNYDER:** Your Honor, if I can --

24 **THE COURT:** -- any particular data.

25 **MR. SNYDER:** If I can just be heard for two minutes or

1 60 seconds. Counsel just said "we're finally at the  
2 beginning." And that really is our concern.

3 We're going to comply with the orders, obviously, as we  
4 have been. There just needs to be some discipline here because  
5 the case is almost four years old. We know how many millions  
6 and millions of documents we've produced, how many hundreds of  
7 thousands of hours we've spent in attorney time producing  
8 documents.

9 And what we're concerned about is this constant moving of  
10 the goalpost into data that we confirmed is not shared,  
11 whatever the next issue is going to be. We're not just at the  
12 beginning, with all due respect. We are at the end of  
13 substantial completion.

14 And this -- if this continues without some guidance from  
15 Your Honor on broad-level, not specific, proportionality and  
16 adherence to overall case schedule, my concern -- and I think  
17 it's very well placed and based on empirical experience -- is  
18 that we will be well into 2022, if not at the end of '22, and  
19 still having this "Whack-a-Mole" detour into data and issues  
20 that we've been litigating for two years, and we won't even get  
21 to the merits of this case until the case is five years old.  
22 And that's not -- that's not appropriate or fair.

23 And so we have -- yes, we have the resources. We're  
24 devoting those resources, ever increasing resources, to comply  
25 with this Special Master process that, frankly, needs more

1 guardrails from this Court unless we're going to, you know,  
2 wake up in June and, I can assure you, Your Honor, we're going  
3 to be in the quicksand and the goalposts are going to be back  
4 and forth.

5 And sometimes enough is enough. And we're in a position  
6 now, we're in no man's land, honestly. We just don't know  
7 where this is going to end, where it's going to go.

8 Now we have hearings before the Special Master, and the  
9 process that was intended to streamline, make more efficient,  
10 and focus on proportionality is kind of out of control, with  
11 all due respect. That's our concern.

12 And so we're not asking Your Honor necessarily to  
13 replicate or intrude on the special master process, but I do  
14 think it would be very helpful from you or Judge Chhabria to  
15 give the special master process a structure with which to apply  
16 a framework on proportionality and the like. Because right now  
17 it's just -- it's really a little bit a free-ranging process  
18 with no guardrails whatsoever.

19 **THE COURT:** Ms. Stein, did you want to add anything?

20 **MS. STEIN:** Only just to close, Your Honor.

21 In keeping with what Mr. Snyder said, one of the important  
22 guardrails that I think Special Master Garrie needs to be  
23 comfortable with is that the only discoverable data in this  
24 case regarding the named plaintiffs is data that was shared or  
25 made accessible. And that is from plaintiffs' mouth. And we

1 relied on that for the past year, and for this to change now  
2 would be completely prejudicial.

3 **THE COURT:** Okay. All right. Let's move on to the  
4 last motion with respect to the deposition of the five formerly  
5 named plaintiffs.

6 I guess I want to know why Facebook needs their  
7 depositions now before having taken the depositions of the  
8 named plaintiffs.

9 And I guess what's interesting about this case is there's,  
10 what, like potentially 300 million, maybe more, I don't know,  
11 users in the class that Facebook has access to. Right?

12 You could go -- if you want to make -- I understand the  
13 standing argument. And since June, it is now crystal clear  
14 that all members of the class have to have standing.

15 Why do you need these five formerly named plaintiffs when,  
16 presumably, you have access to lots and lots and lots and lots  
17 of these consumers?

18 **MS. KUTSCHER CLARK:** Your Honor, we wanted to start  
19 with these five former named plaintiffs because we think  
20 they're the most appropriate absent class members to start with  
21 because they actually inserted themselves into the case.

22 **THE COURT:** So I'm going to stop you there. I'm going  
23 to stop you there because nobody cited it, but I actually ruled  
24 on this. And I said named plaintiffs who withdraw, they're the  
25 opposite of having inserted themselves, right. They've

1 actually taken themselves out. It's not like they've submitted  
2 a declaration. They weren't identified on initials.

3 So I'm really focusing on need. Why do you need it? Now,  
4 there might be a reason why, based on the depositions that you  
5 take of the named plaintiffs. You haven't done that. And the  
6 two that you have, I don't have anything in front of me.

7 But -- and there could be a need if a defendant, for  
8 example, didn't have access to other members of the class. I  
9 could certainly see that. But, in general, right, we don't  
10 order discovery of absent class members. That's the rule.

11 And there are exceptions, for example, if you've inserted  
12 yourself. You're identified as a person on initial  
13 disclosures. If you're a named plaintiff, obviously, you have  
14 to be -- or you submit a declaration, become a witness in the  
15 case. But we don't have that.

16 **MS. KUTSCHER CLARK:** Your Honor, respectfully, these  
17 absent -- these former named plaintiffs are uniquely situated  
18 because all of them have reserved their right to rejoin the  
19 case. And this was an issue we had discussed with the Court  
20 about a year ago, before they withdrew.

21 Plaintiffs had originally asked for an order allowing them  
22 to simply de-prioritize certain named plaintiffs who would not  
23 have to participate in discovery but could then serve as class  
24 members later.

25 We objected to that saying these plaintiffs really need to

1 swim or cut bait -- fish or cut bait, because if they want the  
2 ability to later serve as a class rep, we need the ability to  
3 take whatever discovery we might need about them.

4 Ultimately, at a hearing, I think it was probably last  
5 February, March, the Court encouraged Facebook to enter a  
6 stipulation allowing the voluntary withdrawal of these  
7 plaintiffs, reserving their right to rejoin, stating that  
8 Facebook wouldn't be waiving any rights.

9 And we entered a stipulation with the understanding that  
10 we were not waiving our rights to take discovery from these  
11 individuals so long as they were reserving their right to  
12 rejoin.

13 **THE COURT:** So reserving their right, I know lawyers  
14 always do that. Blah, blah, blah, reserve the right. It's  
15 meaningless, right, because Judge Chhabria is going to decide  
16 whether at some point they could be added.

17 And if discovery has closed, that would be a really good  
18 argument that Facebook could make: No, you can't substitute in  
19 these people because discovery has closed and it will delay it.

20 Right? Isn't Judge Chhabria going to decide? And,  
21 certainly, if he were to decide, yes, I'll let them come in,  
22 we'd have to reopen discovery, and you'd get to take their  
23 depositions of that.

24 So what I'm looking for is why you need it now. You don't  
25 need it for that because if they came back in -- if he allowed

1    them to come back in, which is a big if, right, given how  
2    old -- as Mr. Snyder pointed out -- how old the case is, you  
3    would get it then.

4           So why do you need it now?

5           **MS. KUTSCHER CLARK:** Your Honor, we need it now  
6    because we're building our arguments about the differences  
7    between the current named plaintiffs --

8           **THE COURT:** Okay. I'm going to stop you there.

9           **MS. KUTSCHER CLARK:** -- and some of the absent class  
10   members.

11          **THE COURT:** I'm going to stop you there. You have  
12   access to 299 million users. Why do you need these five? I  
13   mean, you can get them from anyone.

14          And, frankly, these other people would be better for you.  
15   They're all members of the class. They're all members of the  
16   putative class; right? So why these?

17          **MS. KUTSCHER CLARK:** If plaintiffs would not object to  
18   Facebook deposing other absent class members, I think we'd be  
19   in a different situation. But plaintiffs have taken the  
20   position that the only class members Facebook may depose are  
21   the nine, soon to be eight, I believe, current named  
22   plaintiffs.

23          **THE COURT:** No, that's a different matter. What I'm  
24   saying is, are you saying that Facebook couldn't voluntarily  
25   get declarations? I mean, defendants do this -- you've done

1 this, I'm sure, many times in cases.

2 In opposition to class certification, you get declarations  
3 from putative class members. Right? You're saying that  
4 Facebook can't?

5 **MS. KUTSCHER CLARK:** No, no. Of course I'm not saying  
6 that, no.

7 **THE COURT:** So then why do you need the depositions of  
8 these five; right? Why is this any different from any other  
9 case?

10 **MS. STEIN:** Your Honor, I can jump in for a moment and  
11 respond to that.

12 I think, given the number of Facebook users, anyone that  
13 Facebook hand selects is going to be subject to challenge by  
14 plaintiffs, that, you know, we had -- we could pick anyone we  
15 wanted.

16 So we think it's much more probative for us to go to the  
17 source, to the plaintiffs that -- that were named plaintiffs in  
18 this case, that reserved their rights to continue as named  
19 plaintiffs. Those are the ones who seem to believe that they  
20 have the strongest case here.

21 And we want to be in a position to be able to show that  
22 even the people who came forward and wanted to serve as class  
23 reps, who were not hand-selected by Facebook, don't have  
24 standing.

25 **THE COURT:** And you have nine. You have nine. Maybe



1 it's eight, I don't know. Maybe they're dropping. Ms. Weaver  
2 said eight. It went from ten to nine to now eight. You have  
3 them; right?

4 **MS. STEIN:** We want to show that absent class  
5 members -- that members of the class who are not named  
6 plaintiffs do not have standing as well.

7 **THE COURT:** This is what I'm going to do. I mean,  
8 your argument would apply in every single class action, and I  
9 don't think the courts are ready to go there; right. That's  
10 not the rule.

11 I'm going to deny it without prejudice. You take the  
12 depositions of the named plaintiffs and see if you can develop  
13 something. I don't see it. I don't see it here, but maybe  
14 there's something I'm missing that I don't know.

15 But there isn't anything that's been articulated as to why  
16 you would need it and why the rule -- the rule that we don't  
17 generally do absent-class-member discovery absent a special  
18 showing, which hasn't been made.

19 **MS. STEIN:** Your Honor, I don't think that these  
20 former named plaintiffs fall into the bucket of absent class  
21 members because they have inserted themselves.

22 Part of the rule is, have they inserted themselves.  
23 They've inserted themselves. They reserved the right to come  
24 back in. Those are people who have been engaged in the case,  
25 who wanted to seek relief in the case, who are unwilling to say

1 to this Court that they don't want to remove themselves. They  
2 haven't said they want to remove themselves.

3 They haven't said we want to remove themselves because.  
4 They said we -- we aren't willing to cut bait and say we will  
5 not serve as a named plaintiff. And I think that's a very,  
6 very significant distinction, Your Honor.

7 **THE COURT:** Okay. I disagree. We all know why they  
8 did that, because their lawyers told them. Because in case  
9 some of the named plaintiffs get knocked out, then they have a  
10 well that they could go to, to see if Judge Chhabria would  
11 allow them to amend and come in.

12 It happens all the time; right? And sometimes judges give  
13 leave to amend to do that and sometimes they don't.

14 The question is whether you've shown -- you haven't made  
15 any showing. And, again, I disagree as to "inserted  
16 themselves." They've actually withdrawn from the case.  
17 They've withdrawn. They're not a witness. They're nothing.

18 Now, if they reinsert themselves, if Judge Chhabria allows  
19 them at some point to do it, that's a different matter. Right?  
20 I mean -- and he certainly would never do that and not allow  
21 you to depose them. That just wouldn't happen, and you know  
22 that. So I just don't see it.

23 But I do think it's possible, after you take those  
24 depositions, that maybe there is some reason, I don't know,  
25 that I'm not thinking of. So I'll deny it without prejudice,

1 but the showing, I don't think, has been made yet.

2 So let me --

3 **MS. KUTSCHER CLARK:** Your Honor, if I could -- oh, I'm  
4 sorry.

5 **THE COURT:** No, go ahead, because I was going to turn  
6 to a different subject.

7 **MS. KUTSCHER CLARK:** I just wanted to add one point,  
8 that there really is --

9 **MS. STEIN:** Sorry, Mr. Snyder just needs to be  
10 readmitted.

11 I apologize for interrupting you, Martie.

12 **THE COURT:** I swear it was not me who removed him.

13 **MS. KUTSCHER CLARK:** Judge Corley, I understand that  
14 there are cases where a named plaintiff has participated in a  
15 case briefly, withdraws their claims, and then the defendant is  
16 not permitted to take discovery of that individual.

17 But generally, on a higher level, there really is a firm  
18 distinction in the case law between general absent class  
19 members and former named plaintiffs.

20 And, generally, when you look at the case law, the  
21 standard is much different for former named plaintiffs. And  
22 the 2former named plaintiffs standard typically looks at  
23 whether you're seeking to harass the individual, whether the  
24 individual inserted themselves into the case, and whether  
25 there's relevant information to obtain from that person.

1 And all of those factors are met here, and the case --

2 **THE COURT:** No, I disagree. I don't know why you need  
3 it. I don't. Your argument is, if you're a former named  
4 plaintiff, we get the deposition, period, full stop, because  
5 you've given me no reason why what you have at your disposal,  
6 which is the depositions of the eight or nine named plaintiffs,  
7 and all those other users out there who you can get  
8 declarations from, are not sufficient.

9 So that's it. That's -- that's -- I'm not persuaded. I'm  
10 denying it without prejudice. But you have to give me -- the  
11 only reason you're giving me is they're a former named  
12 plaintiff.

13 I agree with you that if you take those depositions of the  
14 eight then you can articulate some reason why depositions of  
15 absent class members could be useful, that those are the people  
16 you should first turn to, right, because they already have  
17 inserted themselves into the litigation, having initially  
18 agreed to be a named plaintiff.

19 And, to boot, this case is different because they withdrew  
20 not because they got cold feet, because the plaintiffs,  
21 frankly, were complaining about the burden of answering  
22 interrogatories. So I agree.

23 And, by the way, so I'm not saying that, because they  
24 withdrew, they never can. The circumstances here were because  
25 plaintiffs were complaining about the burden. I said, well,

1 then don't put up 24. Whoever puts up 24 named plaintiffs  
2 anyway? Right? That's not workable and it's not going to  
3 happen.

4 So I agree with you, Ms. Clark, those are the people we  
5 would turn to first, but we're not there yet to turn to because  
6 you haven't shown me anything other than that they are formerly  
7 named plaintiffs, and I don't think that's sufficient.

8 All right. Okay. So the last thing I want to address, I  
9 want to issue an order about giving you some structure for  
10 scheduling depositions to help -- help you with the deponents  
11 and help each side.

12 So what I'm proposing -- I don't know what your protocol  
13 says, but when a party requests a deposition, that the other  
14 side have seven days to provide dates. That's regardless of  
15 whether you're going to object to the deposition at all.

16 You provide the dates, and then that will give you some  
17 time to work out the objections with the Special Master. Okay?  
18 If it's a nonparty, then you have two weeks to provide dates.

19 If the nonparty can't -- isn't cooperating or you can't  
20 get in contact with them, as sometimes happens with former  
21 employees, then the requesting party then can start assuming  
22 that they're not being represented by the other side and do  
23 what they need to do to schedule that.

24 I think this will help you with your deponents because you  
25 say, The Judge has issued an order, we have to give dates in

1 seven days or the other side is just going to be able to  
2 unilaterally set depositions.

3 I think that helps with both sides and gives you some  
4 ammunition with the deponents. Sorry, not my fault, it's the  
5 Judge, the bad Judge; she put that order out there and we have  
6 to do that.

7 So I think that might head off some disputes, which I'm  
8 seeing on both sides, about scheduling, and will get things on  
9 calendar sooner.

10 So I'm open to hearing a reaction to that since I --

11 **MR. SNYDER:** We're fine. Facebook loves that and is  
12 fine with that.

13 **MS. WEAVER:** Your Honor, Leslie Weaver on behalf of  
14 the plaintiffs. That's fine with us.

15 I do think this digs at a deeper problem. And Mr. Snyder  
16 made some comments earlier about the case schedule. I think  
17 the parties are in agreement that we are all concerned about  
18 the January 31st substantial completion.

19 We are in stark disagreement about how we got here.  
20 Plaintiffs have been working very actively. But we do think  
21 that we need the Court's guidance on this issue about where we  
22 are.

23 And we do think that when discovery orders are issued they  
24 should be complied with quickly, once they are disposed of.

25 And one of the problems that the plaintiffs see in this case,

1 notwithstanding Facebook's earlier admonition at a hearing many  
2 months ago that they would not appeal anything and they wanted  
3 cost shifting for people who did appeal, here we are on motions  
4 for reconsideration and appeals, and plaintiffs are still even  
5 just waiting to get plaintiffs' dataset identified.

6 **THE COURT:** Okay. I'm just going to stop you there,  
7 though.

8 **MS. WEAVER:** Yep.

9 **THE COURT:** They do have a right to appeal. And  
10 Special Master Garrie responded and narrowed his orders in  
11 response to their motions for reconsideration. So I don't  
12 think you can make an argument that there was anything bad  
13 faith about that at all because he responded to it.

14 The protocol or the order has a very limited time for  
15 appeal. And they haven't appealed every order because I've  
16 seen, there's lots of orders on the dockets and they haven't  
17 appealed. And they haven't appealed every aspect of every  
18 order.

19 And I think it would be unfair to say that you could --  
20 you can never appeal. And should you do that, no one would  
21 ever agree to a Special Master. So I just want to -- I  
22 couldn't let that stand uncorrected. I don't think that's  
23 fair.

24 Do you have a case management conference scheduled with  
25 Judge Chhabria?

1           **MS. WEAVER:** We do not. And that might be helpful.

2           **THE COURT:** Yeah. Okay. I will let him know.

3           He's also going to issue an order today modifying his  
4           order as to the appeal process to give you some -- some  
5           argument opportunity, which I think is required, frankly, by  
6           the rule. And we did have this robust argument today, which  
7           was helpful, but you'll also have the ability to do that.

8           And the order will also, unless he changes his mind,  
9           clarify that when I'm unable to serve as the discovery judge in  
10          this case, he will play that role so you won't get another  
11          magistrate judge.

12          **MR. SNYDER:** Thank you, Your Honor.

13          Your Honor, one more request, which is an amplification of  
14          my earlier comments, which is that we are going to now be  
15          before the Special Master and resolving, hopefully  
16          successfully, all these issues.

17          But if Your Honor could, at the highest level, just share  
18          your observations or your guidance on proportionality because,  
19          of course, in an imperfect world, the discovery process,  
20          particularly in a case involving data and the claims here,  
21          could be endless, honestly. We could keep on going on  
22          iteration for months and months and months.

23          And when, for example, the Special Master ordered us to  
24          produce something and we said this could blow open the schedule  
25          and delay it by a year, he did modify his order. But there



1 just doesn't seem to be any urgency in terms of getting to  
2 repose.

3 And proportionality, you know, obviously, is the word of  
4 the day in the federal judiciary, as it must be on discovery  
5 issues. And we just would respectfully request some general  
6 guidance on how Mr. Garrie, who has not been a judge, where  
7 Judge Andler has, that he view -- he was originally our  
8 technical expert, he became a Special Master. You recall we  
9 asked Judge Andler to co-serve for this precise reason. No  
10 disrespect intended, but he is not someone who seems to be  
11 focused on the judicial interests, the institutional interest,  
12 and, frankly, our interest in getting some repose here as  
13 opposed to an open-ended discovery process.

14 **THE COURT:** You know, I heard you before, Mr. Snyder,  
15 but I have to say, as I said to Ms. Clark, his order asking for  
16 the high-level description is exactly how you get to  
17 proportionality, yet Facebook appealed that portion of his  
18 order.

19 All right. But I've heard you. I'll take that into  
20 consideration.

21 Rather than set a next date, what I suggest you do is,  
22 when you believe a next date would be useful -- and I may set a  
23 hearing date if there are additional appeals, but if there's  
24 something else before then, just contact Ms. Means. And in the  
25 era of Zoom, which we don't appear to be leaving anytime soon,

1 it's very easy to get you on -- on calendar.

2 **MR. SNYDER:** Although, I do think it's 50/50 that you  
3 disconnected me just to not hear from me again.

4 **THE COURT:** No, no, no. I would never. I did not.

5 **MR. LOESER:** He did that to me.

6 **THE COURT:** It may have been Ms. Means, but I'm not in  
7 control.

8 All right. Thank you, everybody.

9 (Counsel thank the Court.)

10 (At 11:16 a.m. the proceedings were adjourned.)

11 - - - - -

12 **CERTIFICATE OF REPORTER**

13 I certify that the foregoing is a correct transcript  
14 from the record of proceedings in the above-entitled matter.

15 DATE: Wednesday, January 12, 2022

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20 Katherine Powell Sullivan, CSR #5812, RMR, CRR  
21 U.S. Court Reporter  
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